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IN THE

Supreme Court of the United States

October Term, 1958

No. 436

RAYMOND WOOL,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

BRIEF ON BEHALF OF RAYMOND WOOL, PETITIONER

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Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit has been officially reported at 258 F. 2nd 9. A copy of the opinion appears at page 80 of the Transcript of Record.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered on the 11th day of August 1958. The jurisdiction of this Court is invoked under Title 28, Section 1254 (1) U. S. C.

On December 8th, 1958 an order was made by the Supreme Court of the United States granting a petition for a writ of certiorari (p. 91).

Statutes Involved

Title 18, United States Code.

> "Section 371. Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment proved for such misdemeanor."

Title 18, U. S. C.

> "Sec. 3500. Demands for production of statements and reports of witnesses.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine

to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Title 18, Rule 51 U. S. C.

Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the

court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 26 Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Question Presented for Review

Were the rights of the petitioner substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the government had previously given to government agents?

Statement of the Case

By its indictment, the Government charged that Raymond Wool in concert with other codefendants named therein, conspired to defraud the United States Government in reference to certain Government contracts (Page 12).

The Government called Melvin Carlin to testify on its behalf. His testimony appears in the record commencing with page 21 and ending with page 73. Essentially his testimony was that he was an accountant for a firm known as Bonita Originals owned by Leon Levy, a government witness, and Maurice Ades, a co-defendant. He then re-

lated that in 1952 he had met the co-defendant Marvin Rubin. That around April or May of 1952 there was a meeting held at which there was present Ades, Levy, Rubin and Carlin (page 25). At this meeting Rubin presented a plan wherein he represented that he knew people at the Quartermaster Corps. and that these people would assist him in getting Government contracts. He originally demanded half of the profits and finally agreed to accept a third of the profits (p. 27). Mr. Carlin further testified that Rubin would require about 5% of the contract price to be used as expense money for favors that might be extended to him by Government personnel (p. 30). He also testified that a check drawn on June 13th, 1952 to the order of Leon Levy was cashed and this was an item used by Rubin to pay for expenses he had incurred at Quartermaster (p. 33).

He then went on to discuss a series of checks and stated that all of these checks represented amounts used by Mr. Rubin for the express purpose of paying off Government personel.

Sometime after and in September of 1952 the defendant Raymond Wool was assigned to what is referred to as ASTAPA which took the place of Quartermaster Corps. Raymond Wool was a Captain in the Army who from time to time was assigned as a contracting officer for various government contracts dealing with clothing at ASTAPA.

The witness Carlin at no time directly implicated the defendant Wool but at best laid the ground work for the proof of a conspiracy. In cross examination by Mr. Sullivan, the attorney for the defendant Rubin, the witness Carlin was asked whether he had given a statement of the events he described to Government officials. He said he did and then he was asked whether he signed such a statement and the witness stated "I believe I did" (p. 46). Immediately thereafter Mr. Sullivan asked for the produc-

tion of the statement and the Court refused. Mr. Sullivan then asked that the Court examine the statement to ascertain if there were any inconsistencies and the Court refused to do so (p. 46). Page 74 of the record sets forth the argument between Mr. Sullivan and the Court on the question of the production of the statement, and the Court took the position, that unless there was proof of inconsistencies, counsel was not entitled to view the statement or to impose upon the Court to view the statement.

The witness that followed Mr. Carlin was Mr. Leon Levy.

Mr. Levy testified in great detail as to various transactions between Mr. Rubin and Government personnel stating that Mr. Rubin had asked for various sums of monies to pay off Government personnel including Captain Wool. He described how Rubin told him that for various sums of monies Captain Wool and another worked hard to get another company to assign its contract to Bonita Originals.

Levy also related that Rubin had told him that in his presence Lev had paid off Captain Wool in order to obtain a very large government contract for Navy hats.

The Government sought to prove its case through the testimony of Carlin and Levy setting the foundation for the conspiracy and then presented testimony of other witnesses who testified to various circumstances that occurred at approximately the time described by Levy and argued that this was circumstantial evidence which the jury can consider as tying in Wool with the conspiracy. For example, the Government pointed to the fact that Captain Wool approved the assignment of the Contract from R & J Garments to Bonita Originals. The Government also pointed to the fact that Captain Wool was the successor contracting officer on the Bonita contracts; he was the contracting officer who awarded the white hat contract to Lev;

Captain Wool purchased a home for which he paid approximately $8,000 in cash.

All of the circumstantial evidence presented against Wool is as consistent with innocence as it is with guilt and if the proof of the basic conspiracy falls then the entire case against Raymond Wool collapses.

ARGUMENT

POINT I

The Court seriously prejudiced the defendant's rights by refusing to permit defense counsel to examine a prior statement made by a Government witness.

As was pointed out in the statement above, the attorney for Rubin requested that he be furnished with a copy of the statement made by Carlin to Government agents and this request was denied on the ground that there was no inconsistency shown between the testimony of Carlin and the statement he made before permitting counsel to examine the statement. The seriousness of the error can best be pointed out by quoting the very language of the Supreme Court of the United States in the decision known as *Jencks* v. *U. S.*, 353 U. S. 657 when the Court stated at page 667 of the decision:

> "Every experienced trial judge and trial lawyer knows the value of impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon

the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

"Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, * * * the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal Courts and must therefore be rejected."

The injustice that arises from a refusal to permit counsel to examine a prior statement made by a Government witness is further emphasized in the *Jencks* decision when the court continues at page 668 in the following language

"Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" (Emphasis supplied.)

Let us now examine how the trial Court's ruling affected the entire course of the trial.

Observing the sequence in which the witnesses were produced by the prosecution we note that Carlin was the first witness produced by the Government who testified in reference to the manner in which the conspiracy was to be conducted and on what basis. He also testified in reference to the initial conspirators. The other defendants such as Wool were brought into the picture by witnesses who followed Carlin. For example the very next witness was

Levy and the weight of his testimony is best characterized by the Court of Appeals for the Second Circuit when they refer to his testimony as being "terribly devastating" (p. 85).

It was more than amply shown that Levy had made statements to the Senate Investigating Committee in executive session and to their investigators before appearing before the committee.

In view of the ruling of the court that inconsistencies must be shown before statements can be shown to defense counsel, it became a futile gesture to make the identical request for Levy's statements without prior proof of inconsistencies.

Once the court ruled under what circumstances such statements could be obtained, counsel for all of the defendants were bound by the ruling and were no longer required to make similar requests only to be overruled. Our criminal procedures have been progressing away from the strict common law rules where the trial of the criminal case became a game of wits between counsel for the respective sides. For example under the common law rule unless an exception was taken to a ruling or order of the court, the party that was overruled lost his right to raise the issue on appeal. This was changed by Rule 51 of Title 18 U. S. C. that has made exceptions unnecessary as long as he has raised an objection to the action of the court. The Rule is even broader when it states that if the party had no opportunity to object he would not be prejudiced.

Rule 26 of the Rules of Criminal procedure points up that the admissibility of evidence and the competency and privileges of witnesses shall be governed by the principals of the common law in the light of reason and experience.

Reason and experience support the contention that once the trial court has ruled under what circumstances counsel

for the defense may receive a copy of a prior statement made by a Government witness, the court would not rule differently in the case of a subsequent witness unless his original ruling was complied with.

The court must therefore conclude that the appellant, Wool, was injured not only by the refusal to permit counsel to examine Carlin's statement but was foreclosed from making similar applications as to subsequent witnesses.

POINT II

The passage of Section 3500 of Title 18 U. S. C. does not alter the harm done in the trial Court.

After the trial, Congress passed Section 3500 of Title 18 U. S. C.

In the Court of Appeals it was argued that since the Government has submitted an affidavit *in camera* that no statement exists that the witness Carlin signed or had transcribed, that the section cited above would bar the defendant from an examination. It was further argued that the only document that exists is a summary made by a Government agent of the statements given to him by Carlin.

The Court of Appeals adopted this argument in its decision and came to the conclusion that the trial court's error is rendered harmless (p. 86).

It is respectfully submitted that in light of all of the circumstances the trial Court's ruling created tremendous mischief.

The witness testified that he did in fact make a statement and he believed he had signed it (p. 46). If it is true that he did not give a statement and at that point when the demand was made it turned out that there was no such

statement this would tend to impeach the credibility of the witness. But since the court ruled that we were not entitled to this statement on the grounds that there was a failure to prove inconsistency then the jury had the right to draw the conclusion that there was such a prior statement and that it was consistent with his testimony and therefor he was a truthful witness. With this turn of events, defense counsel were left helpless to impeach the witness.

The passage of the Section in question does not eliminate the problem that arises as to how the trial would go in reference to statements made by subsequent witnesses. Assume that under the circumstances defense counsel would not be entitled under the statute to Carlin's statement, it does not follow that defense counsel would not be entitled to statements given by Levy and the witnesses that followed Levy.

It has been agued that only such a statement can be introduced under Section 3500 as has been either signed, adopted, or approved by the witness or a transcription which is substantially a verbatim recital of an oral statement made by the witness. Since an affidavit was submitted to the Court of Appeals signed by the investigator in which he states that the summary was neither adopted or approved by Carlin nor was it a substantially verbatim recital of an oral statement made by Carlin, we, as defense counsel, would not be entitled to examine same. This places the defendant in a position where he is bound by a decision made by the investigator. Such a question must be determined at the trial and the witness can be asked then whether he adopted such statement as his own rather than bind defense counsel by an affidavit made *ex parte*.

CONCLUSION

It is respectfully submitted that the conviction of the defendant Wool should be reversed and the indictment dismissed or, in the alternative, that the matter should be remanded to the District Court for a new trial.

Dated: New York, New York
March 12th, 1959

Respectfully submitted,

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